EASTERN WASHINGTON BANKRUPTCY NOTES

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From the President

Many thanks to Ian Ledlin and Bill Hames who once again put together a stellar case of speakers and topics at the 1998 Sun Mountain Retreat. They are already working on next year's lineup, so mark your calendars for June 10-12, 1999 for another fun-filled weekend in Winthrop.

As those of you who attended this years seminar will recall, we had a wonderful presentation by Judge Nancy Dreyer who gave our pro bono program a much needed boost. We are working at fine tuning the project in light of her admonitions that we proceed cautiously in order to have a program that works. Last year, many of you received an invitation from me to sign up and participate in this program. I appreciate the overwhelming response that we received, and those of you who responded are on the list. If any members of our organization have not responded and would like to participate in the program, please contact me for the particulars.

So that we may utilize the resources of our volunteer lawyers appropriately, our section will be working with the pro bono programs in Spokane, Tri-Cities and Yakima to implement the project. We will be utilizing the services of the three pro bono coordinators who already have a very good screening process in place to make sure that those who are utilizing the services of volunteer lawyers are income eligible for services under Federal and State guidelines. To that end, the Bankruptcy Bar Association officers have chosen to make three small one-time grants to each of those pro bono programs to assist them in helping us implement our program. The pro bono programs in Tri-Cities, Yakima and Spokane will each receive a grant from our bar of $1,000. These pro bono programs will work closely with our program to ensure its success. If any members have any questions about how our pro bono program will work of the decision to make these small grants, please contact me or any of the other trustees or officers of the bar.

Nancy Isserlis, President
Bankruptcy Bar Association

CLE Credits Revised for 1998 Seminar

The program flyer for the Sun Mountain Seminar and Retreat held June 4-6, 1998, stated that participants earned 9 credits, with only .25 of a credit being an ethics credit. Mr. Neil Savage of the Washington State Bar Association confirms that we have indeed earned 9 credits, but one full credit is an ethics credit. Please correct your records accordingly.

Wynne Named to Chapter 7 Panel

Jan S. Ostrovsky, the U.S. Trustee for Region 18, has appointed Mary T. Wynne to the panel of the Chapter 7 Trustee for the Eastern District of Washington. Ms. Wynne will be the trustee for the Wenatchee division of the district. She replaces J. Kirk Bromily who resigned earlier this year.

Ms. Wynne has served as the Chief Judge for the Tribal Court of the Confederated Tribes of the Colville Reservation (Nespelem, Wash.) from 1992 to present. Prior to that appointment, she was assistant U.S. Attorney for the District of South Dakota (1988–1992), and 1982 to 1988 she was in private practice in Rapid City, South Dakota.

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Inside...

1998 Seminar and Retreat Interesting and Informative

By Ian Ledlin

The 1998 Seminar covered subjects from Agricultural Liens to U.C.C. topics. Attendees learned about state and federal tax issues in bankruptcy cases, current U.C.C. developments, and proposed revisions to Article Nine. Of interest to the consumer bar were discussions of pro bono programs, both on the local and national levels.[1]

Thanks to the following speakers for their interesting and informative materials and presentations: William H. Beatty; Frank Conklin; Frederick P. Corbit; Hon. Nancy C. Dreher; Gary T. Farrell; Hon. Richard P. Guy; Nancy L. Isserlis; Hon. John M. Klobucher; Dillon E. Jackson; Hon. Frank L. Kurtz; Ted S. McGregor; Robert D. Miller, Jr.; Dan Morgan; Zachary Mosner; John T. Powers; Ragan L. Powers; Hon. John A. Rossmeissl; Frank W. Smith, and Hon. Patricia C. Williams. Also thanks to Tim Williams for organizing the golf tourney, Tom Bassett for coordinating with Sun Mountain Lodge, Dan Caine and Mary Ellen Gaffney-Brown for providing Friday Banquet entertainment, the law firm of Hurley, Lara & Adams for providing the 72-hour Hospitality Suite, and Bill Hames for organizing and co-chairing this event.

Mark your calendars now for June 10–12, 1999 for the next Annual Seminar and Retreat, featuring Sam Gerdano (Executive Director of the American Bankruptcy Institute) and Ford Elsaesser (Chair-elect of the ABI), who will discuss changes to the Bankruptcy Code that may be enacted early in 1999.

[1]Following a particularly inspirational presentation by the Honorable Nancy Dreher, the Creditor-Debtor Section and the Bankruptcy Bar Association approved donations to various pro bono programs.

Attorney Fees In Dischargeability Cases

By Ian Ledlin

The recent U.S. Supreme Court decision of *Cohen v. De La Cruz,* 118 S.Ct. 1212 (1998), held that an award of attorney fees is part of the debt that is excepted from discharge. In that case, the local Rent Control Administrator determined that the debtor charged rent in excess of that allowed by law. The debtor ignored the Administrator's order to refund the excess rents, and filed a Chapter 7 bankruptcy petition. The debtor's tenants filed an adversary proceeding, seeking judgment for the excessive rents, treble damages, and reasonable attorney fees,[1] along with a determination that those amounts be excepted from discharge as provided by § 523(a)(2)(A) of the Code.

The Court determined that the obligation to pay treble damages and attorney fees was encompassed in the definition of "debt." Although Cohen was a case under § 523(a)(2)(A), the same result probably applies to all § 523(a) exceptions because the phrase "debt for" as used in § 523(a) "serves an identical function of introducing . . . [each] category of nondischargeable debt."

The Cohen Court discussed the Congressional policy for excepting certain debts from discharge:

The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress "that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start."

The Court also noted that discharging liability for consequential losses caused by the debtor, including attorney fees, would leave the creditor far from whole.

Application of the *Cohen* ruling may dependent upon a statutory basis for the award of attorney fees. In Washington, *Cohen* should apply to dischargeability cases where a written agreement provides for reasonable attorney fees. Washington law at R.C.W. 4.84.330 permits, on an action to enforce a contract, the award of reasonable attorney fees to the prevailing party if the contract so provides. Other bases for a request for attorney fees in dischargeability proceedings may include § 523(a)(5) or (15) (domestic relations[2]), § 523(a)(8) (student loans[3]), and certain types of fraud (e.g., Consumer Protection actions[4]). Whether attorney fees will be awarded where an offer to settle has been made[5] awaits further development.[6]

The *Cohen* decision certainly raises the stakes for a debtor faced with the decision to litigate a dischargeability action. The risk of adding attorney fees to the non-dischargeable debt may be a strong incentive to debtors to settle cases early in the proceedings.

1 A New Jersey statute provided for treble damages and reasonable attorney fees for violation of the rent control laws.

2 R.C.W. 26.09.140

3 Assuming the loan agreement provides for payment of reasonable attorney fees

4 R.C.W. 19.86.090 (treble damages and reasonable attorney fees)

5 R.C.W. 4.84.250

6 Cohen appears to be a one-way street for creditors.

From the Clerk

Internet Access

In January 1997, the Clerk's Office began "imaging" all documents, pleadings and miscellaneous correspondence in cases filed on and after that date. As of September 30, 1998, 200,000 separate documents have been imaged, and are now available over the Internet. This is made possible using a program called RACER (Rapid Access to Court Electronic Records) which is accessed through the court's WEB page at www.waeb.uscourts.gov. Access is available 24 hours a day at no charge. However, at its September meeting the Judicial Conference of the United States established an Internet PACER fee of $.07 per page for public users obtaining PACER information through a federal judiciary Internet site, and thus once the PACER center in San Antonio is able to put its collection mechanism in place, such a fee can be expected. In its action, the Judicial Conference did exclude non-case information from the fee, such as local rules and court calendars. The MML is not yet available on RACER, but is expected to be obtainable in the very near future.

Clerk's Office Computer Terminals Available

There are computers and printers available for use in the public viewing area of the Clerk's Office in both Spokane and Yakima. Case information contained in the court's data base is available for all cases which includes dockets, case, claim, and adversary proceeding information is viewable along with other general information. For cases filed after January 1, 1997, images of all documents are available.

Public Access To Records

11 U.S.C. 107(a) provides that papers filed in bankruptcy cases and dockets of bankruptcy courts are public records and open to examination by the public. Subparagraph (b) provides authority for the court to protect entities in some situations, which is generally done on the motion of a party for an order sealing a record. It should be noted, that all documents filed in a case are promptly imaged and immediately available over the Internet, therefore, if a party desires protection under 11 U.S.C. 107(b) the motion should be made at the time or before the item is given to the Clerk's Office for filing.

Payments By Credit Card Now Available

The Clerk's Office now accepts Visa and MasterCard as payment for filing fees and miscellaneous fees. As with personal checks, credit card payments are not available to debtors for the payment of filing fees. Attorney pro hac vice admission fees are payable to the United States District Court and therefore are not able to be paid by credit card.

Credit card payments will be accepted over the counter, by mail, facsimile or telephone. Transactions made in person by the credit card holder will require the credit card and the signature of the holder. Transactions by courier service and mail will require the name as listed on the credit card, the credit card number, expiration date and the signature of the credit card holder.

Telephone Hearings

Approximately 70 to 80 percent of all hearings conducted in the Eastern District are by telephone conference. This practice which has been in place for over ten years has proven to be very popular and successful. Recently, all chambers have adopted what is known as "Meet Me Calls" to enable all of the participants to be connected. In order to get connected it is required that the participants call the correct phone line at the time of the hearing. The numbers are for Judge Rossmeissl - 353-3182, for Judge Williams - 353-3183, and for Judge Klobucher - 353-3192. If when you call in a hearing is not in progress, announce yourself and the party you represent. Should a hearing be in progress, wait until that hearing is completed before you announce your presence. Some etiquette points worthy of note are:

a) Call in on time as hearings start as promptly as possible at the scheduled time;

b) Listen for a moment as there may be another hearing taking place on the conference line. If there is not, announce yourself and the party you represent, as well as any other parties listening from your office. If there is a hearing ongoing, wait until that hearing is concluded to announce yourself.

c) If using a speaker phone, take whatever steps you can to eliminate as much background noise as possible, such as shutting your office door and turning off any background music.

d) Position your phone so that paper rustling is at a minimum.

e) If using a car phone, stop your car to eliminate engine and road noise, and check you location so that you have an adequate signal.

f) When you are speaking, if appropriate, identify yourself so that other participants and the court recorder will know who is speaking.

Digital Audio Recording

At its September 23, 1997 meeting the Judicial Conference of the United States authorized a study concerning the use of digital audio recording as a method of recording hearings. The Bankruptcy Court for the Eastern District of Washington was one of five bankruptcy courts selected to participate in this study. The other courts involved are testing proprietary systems, whereas, the Eastern District is developing an in-house system utilizing existing hardware. A principal benefit over a purchased system is substantial cost savings, but perhaps even more significant is the ability of the court developed system to integrate the court record with the existing data base of the court. The advantage of digital systems over existing analog systems, as noted by the Judicial Conference Committee on Court Administration and Case Management is enhanced sound quality, immediate and remote access to segments of the record, savings in storage space and simultaneous recording, playback, note-taking and transcription capabilities by users. The product, dubbed EARS (Electronic Audio Recording System), is now in the testing stage which have been met with very positive results.

Changes to Local Rules Adopted

Effective on September 1, 1998 the Bankruptcy Judges approved various changes to the local rules. A summary of the changes is as follows:

LBR 1007-1 (a) now provides a procedure for requesting an extension of time to file schedules and statements, which is set at 5 days notice to the case trustee, the U.S. Trustee and any

Continued on Page 4

From the Clerk cont'd

examiner or creditors committee appointed. The motion to extend needs to be made before the expiration of the time.

LBR 2007.1-1 (Trustees & Examiners(Chapter 11)) was abrogated since FRBP 2007.1 now addresses the matter.

LBR 2083-1(p) (Income Directive) now permits the Chapter 13 trustee to present ex parte an income directive without any notice to the debtor. Although the form Chapter 13 plan at paragraph 7 is based on the prior rule, the new rule requires a court order to allow the debtor to make payments directly to the trustee.

LBR 3016-1(b) (Election to be Treated as a Small Business) has been abrogated since FRBP 1020 now addresses the issue.

LBR 3017-1(c) was deleted as the area covered, Condition Approval of Disclosure Statement is now covered by FRBP 3017.1.

LBR 4003-1 was amended to require that specific information in lien avoidance motions be provided so that a determination can be made as to whether or not an exemption is impaired as set out in 11 U.S.C. 522(f)(2)(A). Particular note should be made to subsection (b)(C) of the rule that not only requires a statement as to other liens, but also a statement if there are no other liens.

LBR 6008-1 is a new rule and provides a procedure to be used where a debtor seeks to redeem property pursuant to11 U.S.C. 722.

LBR 9004-1 now directs that documents containing two or more pages are to be stapled together, however, directs that separate documents are not to be stapled together. This rule is designed to assist in preventing pages of documents from becoming separated during processing, and also to prevent separate documents from being treated as one document during processing.

LBR 9010-1 now permits so-called "Rule 9" attorneys to practice before the Bankruptcy Court; any person who seeks to practice under this should familiarize themselves with Rule 9 of the Rules of Admission of the State of Washington.

LBR 9015-1(Jury Trials) has been abrogated since FRBP 9015 now addresses the topic.

LBR 9070-1 (Exhibits) reimposes a requirement that a party intending to offer five or more exhibits needs to furnish such exhibits in a three ring binder including an index.

The full text of these changes, and of all the rules are available from the court's WEB page at www.waeb.uscourts.gov.

Objections to Proofs Of Claim

LBR 3007-1 requires that "An objection to the allowance of a claim shall include an affidavit or statement under penalty of perjury sufficient to overcome the prima facia effect of the proof of claim pursuant to FRBP 3001(f). The reason behind the rule is that since FRBP 3001(f) provides that a proof of claim constitutes prima facia evidence of the validity of a claim, the court must have before it sufficient evidence to overcome the presumption. In processing proposed orders granting objections to proofs of claim, if the required affidavit or statement under penalty of perjury is not present, the proposed order is returned to the presenter unsigned since there is nothing before the court sufficient to overcome the effect of the proof of claim. A statement that the rule does not apply to a particular objection is not sufficient.

Many times the claimant and the objecting party are able to resolve their differences without the need for an actual hearing. It is suggested that rather than seeking an order, it is actually simpler for the claimant to amend the claim and for the objecting party to withdraw the objection. Stipulations between the parties, even if filed, may not be sufficient to result in the claim being paid as desired by the parties since the trustee pays on claims filed, or as determined by court order. It should also be noted that claims are docketed on a claims docket which is separate from the case docket, and items, such as stipulations, filed in the case docket may not be referenced to the claims docket.

LBR 2083-1(s) provides that the party obtaining an order in a Chapter 13 case is required to serve a copy of that order on the Chapter 13 trustee.

Proof of Claims Filed by Debtor or Trustee

11 U.S.C. 501(c) provides that if a creditor does not timely file a proof of claim, the debtor or trustee may file the proof of claim. FRBP 3004 provides that if a creditor fails to file a proof of claim on or before the first date set for the meeting of creditors, then the debtor or trustee may do so in the name of the creditor, within 30 days after expiration of the time for filing claims. If a proof of claim is filed by the debtor or trustee, the Clerk's Office sends a notice of the filing to the creditor, the debtor and the trustee. It should also be noted that a proof of claim filed by a creditor pursuant to FRBP 3002 or 3003 supersedes the proof of claim filed by the debtor or trustee. When the proof of claim is filed by the debtor or trustee on behalf of the creditor, be aware that it must be clearly identified at the bottom of the document as to who is filing and on whose behalf the proof of claim is being filed.

The Clerk's Office maintains a claims docket which contains summary information concerning filed proofs of claim. Particularly in Chapter 13 cases, it is a good practice for the debtor to review the claims docket once the time to file claims has expired. Claim information is available electronically via either PAS or PACER. PACER, which is able to be accessed through the courts WEB page at www.waeb.uscourts.gov provides an opportunity via the Internet for viewing images of the actual proofs of claim with attachments in cases filed after January 1, 1997.

Determination of Value - 3012 or 3007

LBR 3012 -1 provides notice and disclosure requirements when a party seeks to have the value of a claim secured by a lien on property in which the estate has an interest determined. Although an objection to a proof claim pursuant to LBR 3007-1 on the grounds that the claim is not or is only partially secured due to the value of the collateral may achieve a similar result, there are important differences to be noted. First, notice under LBR 3012-1 is to be sent to the MML with twenty days notice and hearing, with service on the lien holder as required by FRBP 9014, whereas, notice under LBR 3007-1 is to the debtor, debtor's attorney, trustee and the claimant and requires 30 days notice and hearing. Second, an objection to a proof of claim under LBR 3007-1 can only be made if and when a proof of claim is filed; valuation under LBR 3012-1 is not so constrained.

Signing of Documents

FRBP 1008 requires that all petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided by 28 U.S.C. 1746, and FRBP 9011(a) requires that at least one attorney of record sign every

From the Clerk cont'd

petition, written motion or other paper filed .

Should a document be submitted without the required signature, FRBP 9011 provides that such an unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party. The way that the court has devised to deal with this issue is to send a written notice advising the attorney or party of the omission and allowing twenty days for the correction, however, if the document that is unsigned is an initial petition, the time given is five days, and can lead to a dismissal of the case. Care should be taken that all documents required to be signed are properly signed.

New National Forms

Effective in March of 1998 three regular national forms were changed. These forms, the notice of meeting of creditors, discharge, and proof of claim, are now readily available and are being used. The forms are now two-sided and are largely self explanatory.

Filings

Filings of bankruptcy cases continue to rise, although the rate of increase is down. During the first three quarters of 1998, 5900 cases were filed, which was a 9% increase over the same period in 1997, however, percentage of increase in1998 filings has actually been decreasing quarter to quarter. The first quarter was up 14.6% over the same period for 1997, second quarter up 8.8% and third quarter up only 5.1%. On a chapter to chapter basis, when compared to the same periods for 1997, increases have been seen in chapter 7, up 9.6%, and chapter 13, up 10.8%. Chapter 11 and 12 both recorded decreases, percentage wise; -12.5% and -16.6 % respectively. As of September 1998 only 36 chapter 11 cases and 5 chapter 12 cases were filed.

When viewed geographically, as between the Spokane area and the other counties in the district, the most dramatic shift in filings has been in chapter 13s. By the end of September 1997, 387 chapter 13s were filed outside of Spokane, and 500 were filed in Spokane, whereas by the end of September 1998, 508 were filed outside of Spokane, and 474 were filed in Spokane. The out-of- Spokane area also recorded the greatest number of chapter 7 filings; 2735 as opposed to 2142. More chapter 11 cases continue to be filed in Spokane, and Chapter 12s are evenly divided.

Schedule of Unpaid Debts

11 U.S.C. 348 (d) provides that a claim against the estate or the debtor that arises after the order of relief but before conversion in a case, except for section 503(b), that is converted under section 1112, 1208 or 1307, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition. FRBP 1019 provides that the debtor file a schedule of unpaid debts not later than fifteen (15) days after conversion, including the name and address of such creditors. If the schedule of unpaid debts is timely filed, notice to those additional creditors will be provided by the Clerk's Office, however, if it is not so provided, then it is expected that the debtor will provide the notice required by FRBP 1019(6). Debtors should also refer to LBR 1007-1 concerning extension of time to file schedules.

Many practitioners upon conversion of a case will amend the schedules previously filed to include the post petition claims, rather than filing a schedule of unpaid debts. A fee of twenty dollars is required for each amendment to a debtors schedules of creditors or lists of creditors after notice to creditors has been given. Also, in the case of amendments to schedules, LBR 1009-1 should be reviewed as to notice requirements.

Attorney Fees in Chapter 13 Cases Dismissed Before Confirmation

11 U.S.C. 1326(a)(2) requires the trustee to return any monies paid to the debtor, after deducting any unpaid claim allowed under 11 U.S.C. 503(b), which include attorney fees. Once a case is dismissed, unless attorney fees have been allowed or a motion seeking to have them allowed has been filed, the trustee will follow the statute and return the money to the debtor, and file the final account. Frequently the plan provides for attorney fees and the confirmation of the plan constitutes approval of such fees, however, if the plan is not confirmed, then the attorney fees are not allowed. Provision for fees contained in the plan is not considered a motion for their allowance. Thus, if the attorney wishes to seek allowance of fees, then the attorney needs to follow the requirements of LBR 2106 by giving 20 days notice and hearing to the debtor and the trustee as to the fees if the amount of the fee is $1,000 or less. If the requested fees are greater than $1,000 then reference would need to be made to LBR 2016-1.

Reaffirmation Agreements and Extending the Bar Date

11 U.S.C. 524(c) contains specific requirements relating to reaffirmation agreements, subparagraph (1) requires that "such agreement was made before the granting of the discharge..." and subparagraph (2)(A) requires that the agreement must contain a provision that "the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later...".

Some practitioners request, in conjunction with a reaffirmation agreement, that the time to file a complaint to obtain a determination of the dischargeability of a debt be extended so that should the debtor exercise the right to rescind, the creditor would be able to timely file a dischargeability action. The time to object may be extended by order of the court, but FRBP 4007(c) requires that a motion for such an order be made before the time to object has expired. Local practice requires that such a motion be served on the debtor and debtor's attorney with twenty days notice and hearing, unless of course the debtor has agreed to the order.

FRBP 4004(c) directs that "the court shall forthwith grant the discharge" in Chapter 7 cases unless certain specific conditions exist. One of these conditions is that the time to object to the granting of a discharge has not expired. Thus, if the parties have not made a reaffirmation agreement before the bar date, which is initially the same date for both dischargeability issues (FRBP 4007) and denial of discharge issues (FRBP 4004), the discharge will be granted promptly by the court unless the time has been extended in which to file a complaint objecting to the granting of the discharge, or such a motion is pending. If the discharge is so granted, then under 11 U.S.C. 524(c)(1) the parties may have lost the opportunity to enter into such a reaffirmation agreement.

Continued on Page 6

From the Clerk cont'd

Access in a Nutshell

Accessing information contained in the court's data base has never been easier, and is available in a number of different formats:

PAS/PACER - This is a dial up modem system over which case, claim and adversary dockets are available. A fee is imposed and the contact number is 509-353-3286 or 800-676-6856.

VCIS - This is a telephone access system that uses the phone key pad; the access number is

509-353-2404, extension 6, or 800-519-2549, extension 6.

RACER - This is access over the Internet where images are available for cases filed in 1997 and beyond; the access number is 509-353-2402.

FAX - The access number is 509-353-2404 in Spokane and 509-454-5775 in Yakima.

TELEPHONE - The access number is 509-353-2404 in Spokane and 509-454-5660 in Yakima.

LETTER - The address is P O Box 2164, Spokane WA 99210 and 402 East Yakima Avenue, #200, Yakima WA 98901

OVER THE COUNTER - The address is 904 West Riverside, 3rd Floor, Spokane WA 99201 and 402 East Yakima Avenue, Yakima WA 98901.

WEBSITE - The address is www.waeb.uscourts.gov.

Clerk's Office to Open During Lunch Hour

Effective January 4, 1998 the Office of the Clerk in both Spokane and Yakima will be open during the lunch hour, therefore, business may be conducted in the office or by telephone between the hours of 9:00 a.m. and 4:30 p.m. Monday thru Friday, excluding federal holidays. Electronic access to information is available via RACER, PAS or VCIS 24 hours every day.

Advisory Committee Meeting

The court's advisory committee meeting was held on October 26, 1998 in Spokane. As a result of the meeting two subcommittees were formed, one to examine LBR 3007-1, Objections to Claims, and the other to examine LBR 2016-1, Compensation of Professionals, and local form 2016. Members of the Claims subcommittee are Judge Rossmeissl, Brad Mellotte, Denny Colvin, Vannoy Culpepper, Bill Beatty and Dan Brunner. Members of the fees subcommittee are Judge Rossmeissl, Ian Ledlin, Gary Farrell and Bruce Boyden. Anyone wishing to comment in either of these areas may do so directly with a member, or by communicating with Ted McGregor, Clerk, United States Bankruptcy Court, P.O. Box 2164, Spokane WA 99210, or by FAX at 509-353-2404.

The minutes of the meeting are available on the court's Website @www.waeb.uscourts.gov. Also available is a list of the members of the committee, with names and addresses.

The Advisory Committee was established to provide a forum for the exchange of information and ideas between the bench and the bar, and is an excellent opportunity to bring to the attention of the court, issues of interest.

Changes to Dischargeability of Student Loans

A change to 11 USC 523(a)(8) concerning dischargeability of student loans eliminated the 7-year proviso so that now the only way a student loan can be discharged is for the court to find that it would impose an undue hardship on the debtor. This change applies to all cases filed after October 7, 1998, the date of enactment of the legislation.

Tithing and Charitable Contributions

By Gary T. Farrell

On June 19th, 1998, President Clinton signed into law the "Religious Liberty and Charitable Donations Protection Act" (S. 1244). The law affects all cases pending on June 19th, 1998 and those cases filed after June 19th, 1998. The legislation affects both pre-petition and post-petition contributions.

First of all, the effects upon pre-petition gifts and donations. Section 3 of the bill amends Section 548 of the Code to prevent trustees in chapters 7, 11, 12 and 13 from recovering certain pre-petition contributions to religious or charitable entities. The law provides that a trustee cannot recover a pre-petition charitable contribution, made by a nature person (as opposed to a corporation, partnership, trust, etc.) in the form of cash or a financial instrument, to a qualified religious or charitable entity or organization if the amount of the contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made, or if the contribution exceeds 15 percent, the transfer was consistent with the past practices of the debtor in making charitable contributions.

Section 544(b) of the Code has also been amended to provide that an attempt to recover a pre-petition contribution under Federal or State law is preempted by the filing of a bankruptcy case. As a result of the amendments made by the new law, a bankruptcy trustee cannot recover qualified contributions under §548 or under State law or other Federal law.

With regard to post-petition donations, section 4(b) of the bill amends section 707(b) of the Code and provides that a bankruptcy court may not take into consideration whether a debtor has made, or continues to make charitable contributions when the court is considering whether to dismiss a case for substantial abuse. The new law does not specify a dollar limit or percent on the amount of contribution allowed under the amended §707(b). However, the fifteen percent of gross income may be the applicable figure as §1325(b)(2)(A) is amended to exclude from disposable income charitable contributions made to a qualified church or organization in an amount not to exceed 15 percent of the gross income of the debtor for the ear in which the contributions are made.

From the Clerk cont'd

Access in a Nutshell

Option How to	Access General	Description
Public Access to Court Electronic Records - PACER PC &	Modem 353.3286 or 1.800.314.3430	Using a PC and modem with a PC Anywhere IV compatible communications program provides dial-in access to basic case information, case dockets, claims, master mailing lists and court calendars. Additional features include Federal Record Center archived case ordering information, a log for daily filings, and various printing options. Pre registration and a charge of $.60 per minute connect time apply. To register, call 1.800.676.6856.
Voice Case Information System - VCIS	Phone 353.2404 ext. 6 or 1.800.519.2549 ext. 6	Phone system access to basic case information using the phone key pad. Information can be accessed by entering a case number, Debtor's last and first name, Social Security Number, or Tax ID Number. The information provided is name of Debtor, filing date, filing chapter, asset status, attorney, trustee, judge, 341 mtg. date, discharge date and closing date.
Internet Accessibility (Home Page) Website	www.waeb.uscourts.gov	Provides features such as RACER (Rapid Access to Court Electronic Records) and various other options to obtain court information. RACER includes viewable images of documents beginning with cases filed 01/01/97 to the present, options for various searches, basic case status information, docket viewing, printing options, Local Rules, services offered by the court, telephone lists, opinions, links to software offerings, and other U.S. Court sites.
Rapid Access to Court Electronic Records - RACER PC &	Modem 509.353.2402 (Requires Wildcat Navigator)	This dial-in feature gives access to the same information as our Web site RACER. RACER includes viewable images of documents beginning with cases filed 01/01/97 to the present, options for various searches, basic case status information, docket viewing, and several printing selections. Also available is the Wildcat Navigator necessary for access and six different evaluation copies of image viewers. As imposed by the Judicial Conference of the United States there may be an access fee charge in the future.
Faxing documents & info to the Court (non-filing)	Spokane 509.353.2404 Yakima 509.454.5775	Allows routing of faxes from a fax machine directly to the desktop PC of all court clerks using the clerks' fax extension number. To route a fax directly to a desktop enter the phone number of the court, and after the court phone answers, dial the phone extension of the clerk substituting a 3 instead of a 2 for the beginning digit of the extension. For example... if a clerk's phone extension is 219, the fax extension is 319. Copy requests may also be faxed to the court using the court's request form at the 509.353.2404 phone number.
Filing by Facsimile	Spokane - Storey & Miller 509.456.0122 Yakima - Legal Couriers, Inc. 509.453.1134	A General Order of the Court allows a party to fax documents to the court-directed agencies, who are authorized to file the fax. NOTE: Fax filing directly to the court or receipt by the agency does not constitute a filing; actual delivery of the fax to the Clerk's Office constitutes a filing. Costs are paid to the Fax agency. The General Order is available over the Website.
Telephone	Spokane - 509.353.2404 Yakima - 509.454.5660	The court's telephone system includes a personnel directory, hearing options, filing information, a copy request line, archived case ordering information and basic court information. Listen to the various menu options for accessing these information selections.
Walk-In	904 West Riverside, 3rd Floor Spokane WA 99201 402 East Yakima Avenue #200 Yakima WA 98901	The Court's hours are 9:00 a.m. - 12:00 p.m. and 1:00 p.m. - 4:30 p.m. (the court will also remain open from 12:00 p.m. - 1:00 p.m. beginning January 1, 1999). You may view and copy files, and a public room with computer access to court information is available free of charge.
Mail	P O Box 2164 Spokane WA 99210 402 East Yakima Avenue #200 Yakima WA 98901	Correspondence and filings may be sent to the court at the noted addresses.

Discharge of Student Loans in the Ninth Circuit

By Ian Ledlin

Two recent decisions in the Ninth Circuit provide guidance for determining the dischargeabilty of student loan debt under 11 U.S.C. 523(a)(8)(B).[1]

In the case of *In re Taylor,* 223 B.R. 747 (9th Cir.BAP 1998), the Chapter 13 debtors sought a discharge of Mr. Taylor's student loans, claiming repayment would cause an undue hardship. Mr. Taylor had graduated from Emery Riddle University and incurred student loans with balances totalling $86,000 when the bankruptcy case was filed. The debtors had paid on the student loan debt for only six months before filing the bankruptcy case. After filing the bankruptcy case, the debtors commenced an adversary proceeding against the lenders, seeking a discharge of the debt.[2]

The lenders attempted to admit evidence of the debtors' bad faith efforts to repay the loans. The Judge sustained the debtors' objection to the admissibility of this evidence, holding it was irrelevant to the issue of whether repayment would constitute an undue hardship.

The Judge found that the debtors could repay 30% of the loans without causing an undue hardship. The balance of the debts were discharged.

On appeal, the BAP held that nothing in § 523(a)(8) provided for a partial discharge of a student loan. The plain language of the statute is that the debt is either entirely dischargeable or not dischargeable at all. Although § 1322(b)(2) may permit modification of a student loan, it does not provide for a partial discharge of it because § 1328(a)(2) specifically excepts student loans from a Chapter 13 discharge. It also held that a bankruptcy court's equitable powers under § 105 cannot be used to override a specific statutory provision of the Code; therefor, it could not partially discharge the debt on equitable grounds.

The BAP noted that the Bankruptcy Judge applied the first two prongs of the Brunner3 test for "undue hardship" but disregarded the third prong (the debtors' good faith effort to repay). The BAP remanded with somewhat ambiguous direction that the Judge "determine whether [the debtors] made a good faith effort to repay the Student Loan and are entitled to a hardship discharge of the entire Student Loan."

Fortunately, the *Taylor* ambiguity is resolved by *In re Pena,* 151 F3d 1108 (9th Cir. 1998). There, the Chapter 7 debtors sought a discharge of Mr. Pena's Student Loans, claiming repayment would cause an undue hardship.

Mr. Pena had attended a proprietary school and incurred a student loan debt of $9,400. Mr. Pena's "Associate of Specialized Technology" degree was of no use to him, and the credits he earned at the school were not transferrable to other institutions.

Ms. Pena suffered severe medical problems. Mr. Pena's employment was sporadic. Although Mr. Pena had attempted some payment, and although he was employed at the time of his bankruptcy, he claimed it was not possible for him to make future payments because the expenses to maintain a minimal standard of living exceeded his income. The Bankruptcy Court found that repayment of the student loan would cause an undue hardship, and discharged the debt.

The BAP affirmed. It discussed the *Brunner* test for "undue hardship," but adopted the slightly different test set out in *In re Cheesman.*[4] The 9th Circuit affirmed the BAP decision; however, it adopted the *Brunner* test instead of the *Cheesman* test.

The three prongs of the test for "undue hardship" used by the Court are:

1) Can the Debtors maintain a minimal standard of living on their current income while repaying their student loans?

2) Are there additional circumstances that exist which indicate that the current state of affairs is likely to persist for a significant portion of the repayment period?

3) Has the Debtor made a good faith effort to repay the loan?[5]

The Court determined that the debtors could not maintain a minimal standard of living and repay the student loan because their basic living expenses exceeded their income. Ms. Pena's medical condition and Mr. Pena's limited job prospects indicated that the debtors' financial condition would continue to persist. Mr. Pena's attempts to repay the loan, although minimal, were sufficient to demonstrate a good faith effort to pay under the circumstances. The Penas satisfied each of the prongs of the test, thereby proving that repayment of the Student Loan would be an undue hardship.

In summary, a debtor must prove that he or she has satisfied each prong of the test in order to render the debt dischargeable. The creditor only need show that the debtor fails at least one prong of the test to render the debt nondischargeable.

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1 This section permits discharge of a student loan debt if payment of it "will impose an undue hardship on the debtor and the debtor's dependents . . . ."

2 The lenders moved to dismiss the dischargeabilty complaint, claiming it was premature because the debtors had not yet received their Chapter 13 discharge. The BAP upheld the Judge's denial of this motion. Although this adversary case would have been premature if it were for the determination of dischargeability of restitution or of an HEAL loan, this type of debt was distinguishable and the action was timely brought by the debtors.

3 *In re Brunner,* 831 F.2d 395(2d Cir.1987). The three prongs of the Brunner test are discussed below.

4 25 F.3d 356 (6th Cir.1994). The *Cheesman* test has also has three prongs:

1) The debtors could not maintain a minimal standard of living;

2) There is no indication that their financial situation will improve in the foreseeable future, and

3) There is no evidence that they did not act in good faith.

5 The notion that the debtor's pre-petition behavior has a bearing on his post-petition ability to repay the loan is curious. The Bankruptcy Judge in Taylor was probably correct in ruling that the debtor's good or bad faith efforts to repay were irrelevant to the concept of "undue hardship."

Case Notes

The Editor acknowledges with thanks the work of law clerk Julianne L. Hirsch in providing the following case notes from Judge Williams.

Dischargeability of Student Loans

In re Lambertew. Debtor received a student loan in 1990 to attend a 9-month program at Trend College. Debtor completed program although had to interrupt it due to pregnancy. Never received a certificate of successful completion as could not pass the certification test. Completed in 5/91 and again tried to take the test in '92. Trend College closed sometime after 1992. First issue was frustration of purpose as debtor argued that closing of school prevented her from obtaining certification and receiving benefit of the education. The court held that on these facts, no frustration of purpose existed.

Debtor child has attention deficient disorder with all its attendant child care and school difficulties. Debtor now has a second child who is 4 years old who was born prematurely and has reoccurring meningitis and other serious health problems. Debtor also suffers from depression and has serious health problems which have developed during the last few years.

The evidence indicated that the student loan service had sent several letters to the debtor attempting to collect the loan and had referred the obligation to collection in 1997. Those letters advised the debtor to contact the service and make arrangements to pay. The debtor admitted never responding. If contact had been made and the debtor advised the loan service of her inability to pay, the loan service would have referred debtor to various program it had available for deferral or even possible forgiveness of the loans. Under those programs, the debtor would have had to annually report her income and family and financial circumstances but the repayments would have been deferred for several years and possibly the loan forgiven,.

Court applied the totality of circumstances test to determine if undue hardship existed and the loans should be discharged under 523(a)(8). Congress imposed a presumption of nondischargeability of student loans and that exception is to be narrowly construed. Debtor has had minimal income for the past several years and living at or just below federal poverty income levels. Living at a subsistence level and receives some limited public assistance. There is no indication that the debtor's financial circumstances or ability to repay will improve in the future. One of the factors in determining whether undue hardship exists is whether the debtor has made a good faith effort to repay. Although debtor met her burden of proof on the other tests which would render the loans dischargeable, she did not meet her burden of proving a good faith effort to repay.

The court indicated that the case would be held open for 90 days to provide the debtor an opportunity to apply for and take advantage of the relief offered by various deferral and other programs. If debtor is unable to be enrolled in one of those programs or believes that the program she is offered does not alleviate the undue hardship, she may file appropriate pleadings to bring the issue before the court. The court held that any requirement that the debtor provide financial, income and family information to the program provider, even though for several years, would not constitute undue hardship. If the debtor does not file any additional pleadings within the 90 days, the debtor's requested relief in the complaint will be denied and the case closed.

Another Case on Dischargeability

In re Elpel. Husband and wife both are law school graduates. The husband graduated in 1992 and the wife in 1996. They commenced a Chapter 7 proceeding in 1998 at which time they had about $49,000 in credit card debt and in excess of $150,000 in student loan debt. Although the debtors argued that the policy to determine "undue hardship" should be an inability to maintain a middle class lifestyle the court declined to so rule although that policy has been advocated by various commentators such as Slavin in his article in 72 Tulane Law Review.

The court first determined that the burden of both introducing evidence and the burden of persuasion was on the debtors. To determine undue hardship, the court applied the totality of circumstances test as set forth in the *Pena*, *Chessman* and *Courtney* decisions (*In re Pena*, 207 B.R. 919 (9th Cir. BAP Ariz. 1997), *In re Courtney*, 79 B.R. 1004 (Bankr. Ct., N.D. Ind. 1987)). The totality of circumstances test includes consideration of the circumstances which existed before and after filing the Chapter 7 as well as a prediction of the future but emphasizes the circumstances which exist at the time of trial. The court declined to determine whether the value of the law school education was the equivalent of the cost of the education but did consider the existence of a law decree as a factor in predicting future employment and income opportunities.

Although repayment of student loans in excess of $150,000 creates hardship, the code's requirement of "undue" hardship means something more than the fact that the debtors may have a tight budget for the foreseeable future. Congress has imposed a presumption that student loans will not be discharged. The undue hardship exception is to be narrowly construed. There must be extraordinary circumstances which would result in any repayment rendering the life style of the debtors below minimally acceptable standards.

One factor in determining undue hardship is whether the debtors made a good faith effort to repay. The court concluded that the debtors had done so. They paid over $10,000 on the student loans between 1993 and commencing the bankruptcy proceeding and availed themselves of various deferral and consolidation programs. The debtors made good faith efforts to obtain employment in the legal or law related fields.

Another factor to determine undue hardship is the hopelessness of debtor's future financial situation. Dischargeabilty requires more than the present inability to pay. The test is whether there is no reasonable expectation to believe that the debtors would be able to pay any portion of the debt over the term of the obligation. This is particularly important in light of the various programs available to the debtors to assist in repayment of these extremely large student loans. Family size, income fluctuations, health and other factors can be taken into account and low repayment terms established with ultimate forgiveness of portions of the debt. The evidence indicated the debtors had the present ability to repay some portion of the loans and that they would have the ability to repay some portions of the loans in the future and still maintain a minimal standard of living although perhaps not a middle class standard of living. The undue hardship exception to discharge is essentially an ability to pay test. If it is not possible for debtors to repay the entire obligation they are required to repay that portion of the loan that they can afford to repay. The court did not attempt to calculate that amount but did not discharge the debt.

Continued on Page 10

Case Notes *cont'd*

In Comes the New... and Out Goes the Old (figuratively speaking). Sandee Gabriel, current law clerk to Judge Rossmeissl has resigned her position effective September 25 and has accepted a position with the firm of Davidson, Bailey & Medeiros in Spokane commencing October 5. Tap Menard, an experienced Yakima business/bankruptcy practitioner has stepped into the new position. Good luck to Sandee and welcome aboard Tap!

Voidability of Post-Petition Tax Deeds

In re Samaniego, Bankr. E.D. Wash. No. 97-06944-R33, the court was presented with the issue in the chapter 13 context of whether the post-petition recording of four tax deeds based on pre-petition purchases were avoidable under either state law or under bankruptcy sections 544, 548, or 362.

The undisputed facts reflect the debtors received notices of delinquency which were recorded and published and a judgment was entered and a date for sale set with notice to the debtors. Although the debtors retained counsel before the date of sale the sale occurred before the Ch. 13 petition was filed. Without knowledge of the petition, the deeds were recorded post petition. Once notified of the bankruptcy, the purchaser moved to annul the stay to validate the recording of the tax deeds and the debtors objected and moved to avoid the transfers pursuant to 11 USC 544, 548 and 362. The purchasers responded stating the transfers could be perfected pursuant to 11 USC 549.

The court first addressed the debtors' arguments made pursuant to state law. They first contended the residential property was subject to a tax exemption pursuant to RCW 84.36.381 and could not be legally sold. However, the court found the debtors had not filed for the exemption pursuant to RCW 84.36.387 and therefore their argument failed. Next, the debtors argued they were eligible for tax deferral based on RCW 84.64.050. The County had advised the debtors to file for deferral prior to the sale but they had not done so. Accordingly the court found the failure to do so precluded them from raising this argument at this late date. The debtors next argued pursuant to RCW 84.64.050 they had the right of redemption. However, the statute requires redemption prior to the day of sale and the court finding the debtors having failed to do so concluded this argument was without merit. The debtors then argued they could have redeemed the property based on that provision in RCW 84.64.05 which provides a deferral in the case of incompetency, arguing Mr. Samaniego was unable to handle his business affairs. Finding there was no evidence indicating Mr. Samaniego had been adjudicated incompetent, the court found they were precluded from making this argument. Finally the debtors argued at the time of filing the bankruptcy petition, the tax judgment was appealable. Although 11 USC 108(b) which provides for a sixty day extension for filing an appeal from the date of filing, the debtors had not done so within the statutory extension, and therefore the court rejected this argument.

The debtors first contend that under 11 USC 544 they are entitled to avoid the transfer based on the trustee's strong arm provisions. Although the court noted the debtors do not stand in the shoes of the trustee, he considered the argument since the trustee, aware of the matter, had acquiesced in the debtors' prosecution of the case and thus, the court considered the issues raised as on behalf of the estate. Pursuant to 11 USC 544(a)(3), the debtors argue they, like the trustee, standing in the shoes of a bona fide purchase, without knowledge, are entitled to avoid the transfer because they filed their petition prior to the recording of the deeds. The court noted RCW 84.64.050 provides the filing of the certificates of delinquency has the same effect as a lis pendens under RCW 4.28.320. The court held that under *In re Professional Investment Properties of America,* 955 F.2d 623 (9th Cir. 1991) the filing of a lis pendens gives constructive notice to subsequent purchasers, and likewise here the certificates of delinquency gave the debtors constructive notice of the seller's rights in the properties precluding them from acquiring bona fide purchaser status.

Next, the debtors argued under 11 USC 548(a)(2) they could avoid the transfer because they did not receive the "reasonable equivalent value" for the exchange. The purchasers argued under *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 144 S.Ct. 1757, 128 L.Ed. 556 (1994) valuation is immaterial because as a matter of law the purchase price at a non collusive and regularly conducted tax sale constitutes the reasonable equivalent value for purposes of the statute. The debtors countered that the Supreme Court acknowledged in *BFP* that its decision was based on a deed of trust/mortgage foreclosure and that other forced sales or foreclosures may be different. *BFP,* 511 U.S. at 537. Judge Rossmeissl found in the instant case there was active competitive bidding and the properties sold for significantly more than the tax debt on each parcel tax. The court held that these regularly conducted foreclosure sales were not significantly different to justify a different treatment under section 548 and that departure from the standard set forth in *BFP* was unwarranted.

Last, the debtors argued that the act of recording was a violation of 11 USC 362 pursuant to *In re Schwartz,* 954 F.2d 569 (9th Cir. 1992) and therefore void. The purchasers contended that even if the recording was a stay violation, the transfer fell within the exception contained in 11 USC 549(c) which states:

> The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

The court found the only post-petition transfer was the recording of the bare legal title since the transfer of equitable land had transferred at the time of the sale, pre-petition. Consequently the court concluded under 549, the parties holding the title were only transferees and did not meet the definition of good faith purchasers. *In re Schwartz, supra,* at 573-574. Moreover, the court found the requirement that one must be a "good faith purchaser without knowledge of the commencement of the case" made no sense when applied in the context here of pre-filing purchasers. The court reasoned the requirement that the transfer be for "present fair equivalent value" which is determined at the time of sale could not be applied in this context since the transfer here occurred when the title was recorded. For the above reasons, the court concluded that 549 is not applicable to pre filing sales which are unperfected at filing.

Case Notes *cont'd*

Having concluded the tax sales and transfer could not be avoided under 11 USC 544 and 548, and that 549 was not applicable to the facts presented, the court found the delivery and recording was a violation of the automatic stay. *In re Schwartz, supra.* However finding the debtors retained only bare legal title, retaining no interest which would be of benefit to themselves or their estate, the court concluded cause existed to allow the equitable owner to obtain the legal title and ordered the stay be annulled to permit delivery and recording of the tax deeds.

Editor acknowledges with appreciation the work of Bev Benka, Law Clerk to the Honorable John M. Klobucher, in providing the following case notes.

Debtors' Attorneys Did Not Hold Super-Priority Lien in Settlement Funds

Solverson v. Remboldt, Bankr. E.D. Wash., No. A93-0082-K13

In 1993, the debtors filed a complaint against their previous bankruptcy attorney for failure to assume a favorable lease that was property of the bankruptcy estate. In early 1996, defendant agreed to pay $100,000 to settle the matter. Counsel for the plaintiffs filed an application for allowance of attorney fees and costs in U.S. District Court. The attorneys sought payment (from the settlement proceeds) of $40,000 (and costs of $655.25) based upon a 40% contingency fee agreement and $11,527.93 for services rendered in the debtors' chapter 13 bankruptcy case which had been dismissed in March, 1996. The debtors and the IRS objected to the fee application.

The District Court referred the matter to the Bankruptcy Court for a report and recommendation regarding the application for allowance of attorney fees and costs. In a preliminary hearing, the Bankruptcy Judge ordered $40,655.25 to be held in a blocked account and the balance paid to the IRS in partial satisfaction of tax liens filed in 1994 and 1995, pending final determination on the application for compensation. The debtors' attorneys objected to the payment to the IRS and sought to have the IRS disgorge $11,528.93, claiming that the debtors' attorneys held an attorney's lien pursuant to R.C.W. § 60.40.010 in those settlement funds which was superior to the IRS liens. The attorneys relied on 26 U.S.C. § 6323(b)(8) which provides that priority is afforded an attorney who, under local law, holds a lien upon settlement funds "to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement." The attorneys took the position that their purported lien for the services rendered in the chapter 13 bankruptcy case were a "necessary element of the adversary proceeding in order to procure the settlement."

In his recommendation to the U.S. District Court, Judge Klobucher concluded that the attorneys' services in the chapter 13 bankruptcy case did not significantly contribute to the procurement of the settlement in the adversary proceeding, and, therefore, any lien arising from those services did not take priority over the IRS tax liens in the settlement funds. Judge Klobucher further concluded, relying on *Leischner v. Alldridge,* 114 Wash.2d 753 (1990), that the attorneys did not, in fact, have a lien under local law until the attorneys fees became choate when the settlement was reached February 14, 1996. Consequently, the 1994 and 1995 IRS liens were superior to the attorney lien for services in the chapter 13 case under the principle of "first in time, first in right."

Debtor's Post-Petition Attorney Fees Not Entitled to Administrative Priority

In re Star Phoenix Mining Company, Bankr. E.D. Wash. No. 91-00857-K11

In July, 1989, Star Phoenix Mining Co. ("Star Phoenix"), Bunker Limited Partnership ("Bunker"), and Hecla Mining Co. ("Hecla") entered into a Mining Lease and Agreement whereby Bunker and Hecla leased to Star Phoenix mining property ("Mine") in Shoshone County, State of Idaho. In July, 1990, Hecla and Star Phoenix were in dispute whether Star Phoenix had defaulted under the Lease as a result of liens filed by creditors of Star Phoenix. On November, 21, 1990, Hecla notified Star Phoenix that it was terminating the Lease and demanded that Star Phoenix cease mining activity and turn over possession of the Mine to Hecla. That same day Star Phoenix brought suit in the First Judcial Dsitrict Court of the State of Idaho, Shoshone County, seeking a declaratory judgment regarding its rights under the Lease, along with an action for tortious interference with contractual relations and breach of contract.

Four months later, Star Phoenix filed for relief under chapter 11 in the Eastern District of Washington. The Bankruptcy Court entered an order granting relief from stay allowing the litigation to proceed in state court. On Hecla's motion to dismiss, the court found that Star Phoenix had defaulted under the Lease, but that Hecla's motion for summary judgment on the issue of termination should be denied.

In October, 1991, the Bankruptcy Court denied Star Phoenix's motion to assume the lease because Star Phoenix was financially incapable of satisfying the requirements for assumption of the Lease. Once the Lease was rejected, the debtor's only major asset was its claim against Hecla for damages for wrongful termination of the lease.

In August, 1992, the debtor's plan was confirmed. It provided that the debtor pursue its claim against Hecla. The Bankruptcy Court authorized the employment of attorneys to pursue the damages claim in Shoshone County. The litigation resumed in the Shoshone County proceeding. In February, 1994, the Shoshone County Court found, as a matter of law, that Hecla was in breach of the Lease. A jury trial commenced on the issue of damages and in June, 1994, the jury returned a verdict in favor of Star Phoenix, awarding $9,999,999.99 for compensatory damages and $10,000,000.01 for punitive damages. Hecla appealed to the Idaho Supreme Court. In April, 1997, the Idaho Supreme Court reversed the jury verdict and remanded the case with instructions that judgment be in favor of Hecla and that Hecla be awarded attorney fees and costs. The Supreme Court awarded Hecla $198,653.08 for its costs on appeal. On remand, the trial court dismissed Star Phoenix's complaint against Hecla and awarded Hecla attorney fees and costs totaling $510,828.48.

In February, 1998, Hecla filed an application for allowance of administrative expenses of $709,481.56 under 11 U.S.C. § 503(b)(1)(A). The debtor and Bunker objected to the application on several grounds. Judge Klobucher, relying on *Abercrombie v. Hayden Corp.,* 139 F.3d 755, (9th Cir. 1998), determined that while the debtor was liable for the attorney fees and costs awarded to Hecla, they did not constitute an administrative expense because they arose out of a pre-petition transaction, the Lease which the debtor entered into over one year prior to filing

Continued on Page 12

for bankruptcy. In *Abercrombie,* the Ninth Circuit Court of Appeals held that "the relevant inquiry focuses on whether the contract giving rise to the claim was entered into before or after the bankruptcy petition," and that expenses arising out of pre-petition contracts are treated under the Bankruptcy Code as non-prioritized unsecured claims. *Abercrombie,* 139 F.3d 755, 757.

Absent Prohibition by Appellate Court, Bankruptcy Court May Take Additional Evidence in Proceeding on Remand for Additional Findings of Fact

Delobel v. PHEAA, Bankr. E.D. Wash. No. A95-0042-K13

The debtors, Mr. And Mrs. Delobel, sought to discharge several student loans on the basis of undue hardship. The Bankruptcy Court determined all of the student loans were dischargeable. One of the defendants, Pennsylvania Higher Education Association, appealed to the U.S. District Court for the Eastern District of Washington. The U.S. District Court vacated the order determining the student loans dischargeable and remanded the matter to the Bankruptcy Court. The order of remand included instructions to make additional findings of fact on whether the debtors' circumstances were likely to persist for a significant portion of the repayment term.

The Bankruptcy Court held a status conference in the adversary proceeding and the Bankruptcy Judge advised the parties additional evidence would be necessary regarding Mr. Delobel's medical condition. PHEAA filed a motion to preclude additional evidence on remand, asserting that the Bankruptcy Court would be contravening the District Court's order on remand if it allowed additional evidence and that the plaintiffs had not taken the requisite procedural steps to reopen the record.

Judge Klobucher denied the motion, relying on numerous cases holding that unless the appellate court indicates otherwise, it is within the trial court's discretion as to how it might best meet the directives in the mandate. Judge Klobucher found that the record was devoid of any evidence upon which the Court could issue additional findings and determined the Court must take additional evidence to meaningfully address the mandate of the U.S. District Court.

In addressing the procedural issue, Judge Klobucher noted neither the Federal Rules of Bankruptcy Procedure nor the Federal Rules of Civil Procedure dictate a procedure for reopening the record on remand in an adversary proceeding. In this particular case, the District Court vacated the order discharging the debtors' student loans, therefore, the question of dischargeability was yet to be decided.

Judge Klobucher noted that Bankruptcy Courts have broad equitable powers to review the question of dischargeability of student loans and that precluding the plaintiffs from adducing additional evidence at this time would not necessarily foreclose them from doing so in a subsequent proceeding. He suggested it would be in the best interests of all to complete the record at this juncture.

Upon Dismissal of Chapter 13 Bankruptcy Case, IRS Entitled to Funds Held by Trustee

In re Stephens, Bankr. E.D. Wash. No. 96-01352-K13

The debtors filed for relief under chapter 13 and commenced making payments of $1,500 per month to the Chapter 13 Trustee. After making nine payments, the debtor ceased making payments and the case was dismissed on the Chapter 13 Trustee's motion. Upon dismissal, the Chapter 13 Trustee held $13,500 paid in by the debtors.

Prior to the dismissal, the debtors' attorney filed an application for compensation, which was contested and remained pending at the time of dismissal. After the case was dismissed, the attorney requested the Court to issue an order directing the Chapter 13 Trustee to pay the attorney his requested compensation from the funds held by the Trustee. The court held a status conference on the attorney fee application and set an evidentiary hearing on the reasonableness of the requested compensation.

Subsequently, the IRS notified the Chapter 13 Trustee that it had a lien on the funds held by the Trustee. The Chapter 13 Trustee filed a motion to pay the funds to the IRS and the motion was noted for the same date as the hearing on the attorney's application for compensation.

At the hearing, Judge Klobucher initially determined that the Bankruptcy Court retained jurisdiction to consider the application for compensation after the bankruptcy case had been dismissed. Judge Klobucher noted that no attorney lien on the funds would arise until the attorney fees became fixed and choate upon approval of the application for compensation by the Court. Consequently, the only lien upon the funds was the IRS lien. The Court granted the Chapter 13 Trustee's motion and ordered the $13,500 paid to the IRS.

Appointment of Trustee Affirmed; Appellant Sanctioned by BAP

McNeil v. General Management et al, BAP Nos. EW-97-1328-RRyMa, EW-97-1329, EW-97-1330 (Consolidated)

In April, 1997, a pro se creditor appealed the Bankruptcy Court's order directing appointment of a trustee and the order approving the appointment of a trustee in three related Chapter 11 cases. The appellant also filed an emergency motion with the BAP for a stay pending appeal, which the BAP denied.

After hearing oral argument in Spokane on October 23, 1998, the BAP issued an unpublished decision on October 30, 1998. The appellant's primary argument was that the Bankruptcy Court approved the appointment of the trustee without any evidence and made no factual findings to support the appointment. The BAP disagreed. The BAP found that the Court had considered affidavits, exhibits, and oral testimony and that the Bankruptcy Court's order approving the appointment of a trustee did contain factual findings, citing the Bankruptcy Court's order:

> The court finds that the process of this case, for whatever reason, is in total disarray, including lack of proof of insurance on the real property involved, failure to produce financial information and records, failure to comply with reporting requirements, lack of legal representation, and the consequent failure to pursue an orderly resolution of important legal matters which hamper the debtor's prospect of successful reorganization.

The appellant also contended that the trustee engaged in an illegal pre-appointment conspiracy with the secured creditors to fix the trustee's and his counsel's bankruptcy fees. The BAP did not find merit in the appellant's arguments and concluded the

trustee and his counsel fully complied with the applicable provisions of the Code and Rules governing employment and compensation.

Finally, the BAP stated that despite its warning, appellant's opening brief violated numerous rules of appellate procedure, including technical violations in an obvious attempt to circumvent page limits and failure to include a statement of the issues and applicable standard of review. The BAP sanctioned appellant $250 for disregarding its prior order and violating numerous rules of appellate procedure.

And from the Central Dist. of California:

Thanks to Tom Hinshaw, Law Clerk to Judge John M. Klobucher, Central District of California, for providing these notes.

Judge Klobucher returned to sunny Santa Barbara, California (El Niño let up for him during this) on a temporary assignment in April. Here are selected rulings from his California docket:

Perfecting a Security Interest in a Mickey Mouse CD

A creditor asserted a security interest in two certificates of deposit (the "CDs"). The debtor was in the business of constructing mechanical devices for theme parks, including Disneyland ("Disney"). The debtor had purchased the CDs and put them in the name of Disney, in lieu of a performance bond under the "Light Magic contract" between the debtor and Disney.

The Committee of unsecured sued to avoid the transfer of the debtor's interest in the CDs as preferential transfers. The debtor and the creditor had entered into a Security Agreement, which gave the creditor a security interest in, among other items, all of the debtor's accounts and general intangibles. The debtor also executed an Assignment of Deposit Account, which purported to give the creditor a security interest in the CDs. The debtor also executed a UCC-1 financing statement. However, through various errors in the UCC-1 form and the filing fee sent with it, the creditor took two months to file its financing statement with the Secretary of State of California. The creditor was also the issuing bank for the two CDs, so it took the position that they were deposit accounts and, under the Uniform Commercial Code, filing a financial statement was not necessary to perfection. The creditor also argued that, notwithstanding the delay in filing, the transfer of a security interest was intended as a contemporaneous exchange for new value and was, in fact, a contemporaneous exchange not subject to avoidance by virtue of § 547(c)(1).

No Self-Perfecting Security Interest: The Court determined that the creditor's security interest was not a self-perfecting interest in a deposit account under § 9302(1)(g) of California's Commercial Code. The Court looked to *Bakersfield Westar Ambulance, Inc. v. Community First Bank,* 123 F.3d 1243 (9th Cir. 1997), for an analysis of the nature of a security interest in a deposit account. The Ninth Circuit reasoned that when a depositor puts money in a bank account, it enters into a debtor-creditor relationship with the bank. Title to the funds passes to the bank, with the depositor receiving a contract claim for the account balance. The depositor has an intangible chose in action against the bank. A creditor's security interest in a deposit account attaches to the intangible chose in action. Here, however, that direct chose in action against the bank belonged to Disney, not the debtor. The debtor's claim to return of the CDs arose under its contract with Disney, not its contract with the creditor. The debtor's claim under the Disney contract was not an interest in a deposit account, but simply a general intangible claim. Therefore, perfection of a security interest in that asset required filing a financing statement.

Contemporaneousness Lacking: The Court then turned to the contemporaneous exchange defense relating to the perfection two months after the loan. The Court rejected the Committee's argument that a per se twenty-day rule should apply to the contemporaneous exchange defense in light of the Supreme Court's decision in *Fidelity Financial Services v. Fink,* U.S., 118 S.Ct. 651, 139 L.Ed.2d 571 (1998) (a case decided under § 547(c)(3), which contains a twenty day "relation back" period for perfection of a purchase money security interest). That case has no application to § 547(c)(1). The Court determined that the transfer occurred upon filing, since it took longer than the ten day grace period in § 547(3)(2). Even applying a flexible standard under § 547(c)(1), the Court found that the creditor's problems with filing the UCC-1 were of its own making and the two month delay did not justify invoking the contemporaneous exchange defense. The Court granted summary judgment avoiding the transfer of the security interest in the debtor's interest in the CDs.

Official Committee of Unsecured Creditors v. Camarillo Community Bank (In re Spectra F/X, Inc.), Bk. No. ND 97-12264 RR, Adv. No. 97-1262, 4/29/98.

Not All of General Partner's Debts to Partnership are Nondischargeable

Two general partners and a partnership sued the other general partner, a debtor in a Chapter 7 case, to except the debtor's obligations to the partnership from discharge pursuant to § 523(a)(4). The partnership constructed an office building in Pismo Beach, California. The debtor owned two businesses that leased office space from the partnership. At the time the debtor filed his bankruptcy case, he owed back rent and tenant improvement charges to the partnership. The partnership had lost the building through foreclosure.

Novation Must Be Express: First, the Court rejected the debtor's argument that a settlement agreement among the parties constituted a novation and precluded the dischargeability suit. To preclude dischargeability litigation, a settlement agreement must include an express novation. *Key Bar Investments, Inc. v. Fischer (In re Fischer),* 116 F.3d 388 (9th Cir. 1997). The settlement agreement in this case provided that, in the event of default, the agreement was null and void and the underlying claim would be reinstated. Therefore, there was no novation.

Breach of Fiduciary Duty Requires More Than Breach of Contract: The plaintiffs argued that the partnership entrusted the debtor with property and he failed to pay or account for it. The plaintiffs' theory was that the failure to pay the agreed upon rent, was failure to pay over property of the estate. In effect, the plaintiffs said, the debtor "stole" partnership property. The Court found that this theory would elevate every breach of a lease to conversion. To be nondischargeable under § 523(a)(4), the debt must arise from a breach of a trust obligation, separate and distinct from any

Continued on Back Page

The Priority and/or Dischargeability of Federal Income Tax Obligations in Chapter 7 and 13

By John W. Campbell

The question of whether a debtor's income tax obligations are a priority debt and/or dischargeable is determined by the interplay between 11 U.S.C. § 523(a) and 11 U.S.C. § 507(a)(8).

11 U.S.C. § 523(a) provides as follows:

> A discharge under §§ 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> (1) for a tax or a custom duty:
>
> (a) of the kind and for the periods specified in § 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (b) with respect to which a return, if required:
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (c) with respect to which the debtor made a fraudulent return or willful attempt in any manner to evade or defeat such tax. . . .

11 U.S.C. § 507(a) provides an eighth level priority for . . . allowed unsecured claims of governmental units, only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts —

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time, plus 30 days during which an offer in compromise with respect to such tax that was made during 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of the kind specified in § 523(a)(1)(B) or § 523(a)(1)(C) of this title not assessed before, but assessable under applicable or by agreement, after the commencement of the case; . . . .

Reading these two statutes in an effort to determine what is priority and what is dischargeable in either Chapter 7 or Chapter 13 is a Sisyphean task.[1] Irrespective of the number of times I have reviewed the statutes, I have never permanently understood what they mean. With each new tax-troubled client, I have struggled with the statutory language and the ultimate application. In an effort to avoid rolling the heavy rock, two years ago I dictated a memorandum to my general file setting forth conclusions drawn following repeated untangling of the statutory web. I simply broke the statutes down into various categories and then analyzed whether a given income tax return had priority or dischargeable status in both the context of a Chapter 7 and Chapter 13.

As a preliminary statement, understand that dischargeability and priority, while sometimes overlapping, are very distinct issues. The reason for this is that the 11 U.S.C. § 523(a) discharge provision has no application to Chapter 13's ordinary course discharge under 11 U.S.C. § 1328(a). Note that § 1328(a) is the only discharge provision of the various chapters that is excepted from § 523's application. Conversely, the § 507 priorities only address the order in which assets are to be distributed — assuming there is any distribution at all. However, what is defined in § 507 as priority becomes important in a Chapter 13 since all priority taxes must be paid in full.

Given the above principles, the priority and/or dischargeability of 1040 (income) taxes are determined as follows:

I. The Three-Year Rule:

A tax measured by gross income or receipts due for a taxable year for which the return is last due after three years before the date of the filing of the bankruptcy.

A. Whether or not a tax return has been timely filed.

	Priority	Dischargeable
Chapter 7	Yes	No
Chapter 13	Yes	No — must be paid in full

II. The Late-Filed Rule:

A. More than three years old, late-filed within two years prior to petition.

	Priority	Dischargeable
Chapter 7	No	No
Chapter 13	No	Yes

B. More than three years old, late-filed more than two years prior to petition.

	Priority	Dischargeable
Chapter 7	No	Yes
Chapter 13	No	Yes

III. The No Return Filed Rule:

A. For tax within the three-year rule.

	Priority	Dischargeable
Chapter 7	Yes	No
Chapter 13	Yes	No

B. For tax outside the three-year rule.

	Priority	Dischargeable
Chapter 7	No	No
Chapter 13	No	Yes

IV. The Fraudulent Return Rule:

A. Timely fraudulent returns.

1. For tax within the three-year rule.

	Priority	Dischargeable
Chapter 7	Yes	No
Chapter 13	Yes	No

2. For tax outside the three-year rule.

	Priority	Dischargeable
Chapter 7	No	No
Chapter 13	No	Yes

B. Untimely fraudulent returns.

1. For a tax within the three-year rule.

	Priority	Dischargeable
Chapter 7	Yes	No
Chapter 13	Yes	No

2. For a tax outside the three-year rule.

	Priority	Dischargeable
Chapter 7	No	No
Chapter 13	No	Yes

V. The 240-Day Rule:

The Priority and/or Dischargeability of Federal Income Tax Obligations in Chapter 7 and 13

Pursuant to this section, regardless of the tax year, if a bankruptcy case is filed within 240 days after a tax is assessed against the debtor, the tax will not be dischargeable and will be treated as priority in that bankruptcy case. (Note: 240 days must also take into account any time plus 30 days during which an Offer in Compromise was made during 240 days after such assessment was pending.)

	Priority	Dischargeable
Chapter 7	Yes	No
Chapter 13	Yes	No — must be paid in full

VI. The Assessability Rule:

This section excepts from discharge and grants priority to taxes that are unassessed but assessable. For the most part, this applies to situations in which the debtor has agreed to the extension of a statutory period. For instance, assuming a debtor's return is timely filed and the three-year assessment period is about to expire, the IRS may inform the debtor that, if he does not agree to the extension, the IRS will immediately assess the tax so as to be within the statutory period. Assuming the debtor filed a Chapter 7 more than three years after a timely tax return filing, but also agreed to an extension of the statutory period, the tax, which would have been non-priority and dischargeable, but for the extension, retains priority and nondischargeable status.

	Priority	Dischargeable
Chapter 7	Yes	No
Chapter 13	Yes	No — must be paid in full

Additional Considerations and Applicable Statutes

1. Caveat: The above refers to income taxes only. Pursuant to 11 U.S.C. § 507(a)(8)(C), taxes that are required to be collected or withheld, such as federal and state withholding taxes and some use taxes, are never dischargeable.
2. The first inquiry of a tax burdened client is to determine if the IRS has filed liens. If liens are filed, the IRS is a secured creditor with respect to practically all of the debtor's assets. Exemptions are not excepted from the application of the lien. In other words, the debtor has no homestead right, no pension right and generally no other exemption right in the bankruptcy. The IRS will apply the lien to the nondischargeable taxes before the dischargeable taxes. Accordingly, the entire analysis of what is or is not dischargeable is a moot point if liens are properly filed.
3. Assessment provisions:
   a. 26 U.S.C. § 6501(c) — IRS has three years to assess tax once return is filed;
   b. 26 U.S.C. § 6501(b)(1) — returns are deemed filed no earlier than the last day proscribed by law (i.e., April 15 — no sooner than this date); and
   c. 26 U.S.C. § 6501(a) — if no assessment within three-year period, there can be no collection after expiration of that period, unless extended by law or agreement.
4. 28 U.S.C. § 6503 — suspends period during which IRS can make assessment during pendency of bankruptcy until leave of court is granted, plus 60 days.
5. 28 U.S.C. § 6503(b) — the period of limitations on collection after assessment proscribed in § 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States . . . and for six months thereafter. (Note: this includes the time period under which the automatic stay is imposed.) In re West, 5 F.3d 423 (9th Cir. 1993).
6. Penalties associated with income taxes are addressed pursuant to the specifics of 11 U.S.C. § 523(a)(7) which excepts from discharge any debt -

   (7) to the extent such a debt is for a fine, penalty or forfeiture payable to or for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty -

   (A) relating to a tax of a kind not specified in Paragraph (1) of this subsection; or

   (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition; . . .

Fortunately for all of us, in the case of *MacKay v. U.S.*, 957 F.2d 689 (9th Cir. 1992), the court untangled this matter by analyzing § 523(a)(7) as being separated into four basic divisions:

(1) Initially, § 523(a)(7) makes nondischargeable any penalties owed to a governmental unit.
(2) Withdrawn from the nondischargeable group are penalties, fines or forfeitures for actual pecuniary loss.
(3) Withdrawn from the nondischargeable group are tax penalties attributable to taxes which are dischargeable.
(4) Finally, withdrawn from the nondischargeable group are any tax penalties imposed with respect to a transaction or event that occurred before three years before the date of the bankruptcy filing.

Good Luck!

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[1] Sisyphus is a legendary king of Corinth condemned to roll a heavy rock up a hill in Hades only to have it roll down as it nears the top.

Poetry Corner

Bureaucrat's Lament

(News Item: The federal government must now write all documents designed for consumers in "plain English". The Vice President of the United States will oversee the new program.)

I'll speak only in language Plain 'Cause Al Gore told me to.
Celt and Anglo-Saxon words, Short and straight and true.
No more will I "utilize", Or blab in passive voice.
Crisp and clear and active verbs will always be my choice.
I'll state my meaning straight away, No fog or doublespeak.
Of acronyms and legalese my writing will not reek.
I'll do my best to pander to the level of the mob.
I'm sure that once they understand, I'll be out of a job.

Jake Miller

Debtors' Attorneys' Fees in Ch. 13 Cases Filed in First Half of 1997, Eastern District

By Robert D. Miller Jr.

Editors note: The following report was prepared for and submitted to the court in a series of fee hearings held before the Honorable John A. Rossmeissl. The report is printed in its entirety, with the obvious exception that the names of the various attorneys are omitted. The decision to print the report is based upon the fact that its existence is known (and curiosity exists) and the content may be helpful in discussing the state of chapter 13 attorney fees in the Eastern District of Washington.

September 11, 1998

Methods Used in Gathering Statistics

I obtained from the chapter 13 trustee a listing of all cases filed under, or converted to chapter 13 in the Eastern District of Washington between January 1, 1997 and June 30, 1997. A total of 598 cases were filed during that period; of those, 380 were still active.

In step one, I examined the active case files of all cases whose case numbers ended in 26 through 51 and 74 through 99 (52% of all cases filed during the period). In step two, I further examined the files of all cases filed by any attorney who had not had at least five cases selected in step one, and all cases filed by any attorney who normally charged for fees on an hourly basis. In steps one and two I examined the case files of 242 cases — 64% of cases filed during the first half of 1997 that were still active. Of those 242 cases, 221 — 90%— were confirmed.

The case files I examined were those maintained by the chapter 13 trustee. In a relatively small number of cases where information was missing, I examined the official court file maintained by the clerk of the bankruptcy court.

To obtain information on the fees charged in each case, I looked at the Attorney Disclosure Statement required by 11 U.S.C. §329 and FRBP 2016. A relatively small percentage of cases files did not contain an Attorney Disclosure Statement. In those cases I examined the Statement of Affairs and Plan to determine the fees already paid and to be paid under the plan.

I classified the fees charged by attorneys into three categories: (1) Flat Fees, (2) Hourly Fees, and (3) Flat Plus Hourly Fees. An attorney charging a flat fee charges a fixed amount for all services involved in taking a chapter 13 case to confirmation. The Disclosure Statement of a flat fee attorney sometimes states that the flat fee covers services only through the meeting of creditors, or excludes from the flat fee "adversary proceedings and contested matters". However, almost no flat fee attorneys disclosed any extra fees for work past the meeting of creditors through confirmation, or for routine claim or confirmation contests. Most attorneys who work on flat fees do so exclusively. Fee applications are not required in the Eastern District for chapter 13 attorney fees less than $1,000. Almost all flat fee attorneys charge less than $1,000, and I found no fee applications in those cases.

An attorney charging an hourly fee bills for the time spent on the case by the attorney, and often by a paralegal. A fee application covering all work performed is filed with the court. An attorney filing a flat plus hourly fee charges a flat fee for the initial services, usually through the meeting of creditors, and then bills hourly for work thereafter. Some flat plus hourly attorneys itemize their flat fee services on the fee application, and some do not. I counted as flat plus hourly those attorneys who itemized their pre-meeting time, but apparently stopped recording that time when it reached the flat amount.

Hourly fees or flat plus hourly fees were disclosed by attorneys who filed 47 of the 380 active cases. I estimate that less than 15% of chapter 13 cases are filed on a hourly or flat plus hourly fee. Fee applications were contained in less than half of those 47 case files, either because, the attorney had abandoned the fee, the attorney intended to file an application later, or the attorney collected a fee without application. I examined only 21 fee applications.

In totaling the fees shown on fee applications, I eliminated fees for services which appeared unrelated to the bankruptcy, such as securities or personal injury work, and fees for services after confirmation. There was not much of either shown on the fee applications I examined. I used the meeting date as the breakdown between pre- and post-confirmation services. With considerably more effort, it would be possible to obtain greater detail in the itemization of services. For example, a separate average might be obtained for schedule preparation or plan objections. It is not clear, however, that a further breakdown would be helpful unless the sample size were much larger and the fee application entries much more transparent.

I determined the monthly plan payment by examining the plan, or in some cases, the Trustee's Report on Confirmation. I took the scheduled claims from the Trustee's Report, or from the schedules themselves.

Table 1

SUMMARY OF CHAPTER 13 CASES FILED IN THE FIRST HALF OF 1997

CASES FILED 1/1/97 TO 6/30/97			**598**	
AS OF 8/11/98				
Dismissed before confirmation.			**140**	(23%)
Converted before confirmation			**53**	(9%)
Dism. or conv. after confirm.			**25**	(4%)
ACTIVE CASES as of 8/11/98			**380**	(64%)
ACTIVE CASE FILES EXAMINED			**242**	(64% of active) (40% of total)
Confirmed	**221**	(91%)		
Not confirmed	**21**	(9%)		

Table 2

SUMMARY OF CHAPTER 13 ATTORNEY FEES DISCLOSED FOR CASES FILED IN THE FIRST HALF OF 1997

	Division	Attorney	Avg. Fee	Cases Filed	% of Tot.	Cum. %
1.	Spokane	A	**$ 979**	84	14.0%	14%
2.	Yakima	B	**$ 903**	79	13.0%	27%
3.	Spokane	C	**$ 596**	27	4.5%	
4.	Spokane	D	**$ 900**	27	4.5%	36%
5.	Spokane	E	**$ 693**	26	4.5%	
6.	Yakima	F	**$ 880**	25	4.5%	
7.	Spokane	G	**$ 880**	24	4.0%	49%
8.	Spokane	H	**$ 976**	21	3.5%	
9.	Yakima	I	**$ 583**	21	3.5%	56%
10.	Yakima	J	**$ 960**	18	3.0%	
11.	Yakima	K	**$ 969**	13	2.0%	
12.	Spokane	L	**$ 1,000**	11	2.0%	
13.	Yakima	M	**$ 832**	10	1.5%	65%
14.	Yakima	N	**Hourly**	9	1.5%	
15.	Yakima	O	**$ 600**	9	1.5%	68%
16.	Yakima	P	**$ 580**	9	1.5%	
17.	Spokane	Q	**$ 1,000**	7	1.0%	
18.	Spokane	R	**Hourly**	7	1.0%	
19.	Yakima	S	**$ 1,000**	7	1.0%	
20.	Spokane	T	**$ 1,675**[1]	7	1.0%	74%
21.	Spokane	U	**$ 600**	5	1.0%	
22.	Spokane	V	**$ 1,000**	5	1.0%	
23.	Spokane	W	**Flat plus Hourly**	4	0.5%	
24.	Spokane	X	**$ 425**	4	0.5%	
25.	Spokane	Y	**Flat plus Hourly**	4	0.5%	77%
26.	Spokane	Z	**$ 600**	3	0.5%	
27.	Spokane	AA	**n/d**[2]	3	0.5%	
28.	Yakima	BB	**Hourly**	3	0.5%	
29.	Yakima	CC	**$ 1,000**	3	0.5%	
30.	Spokane	DD	**$ 523**	3	0.5%	
31.	Yakima	EE	**$ 800**	3	0.5%	
32.	Spokane	FF	**$ 675**	3	0.5%	
33.	Spokane	GG	**$ 750**	3	0.5%	
34.	Yakima	HH	**$ 667**	3	0.5%	
35.	Yakima	I I	**$ 1,000**	3	0.5%	
36.	Yakima	JJ	**Hourly**	3	0.5%	
37.	Yakima	KK	**n/d**	3	0.5%	83%
38-94		Various	**$ 769**[3]	74	12.5%	96%
		Pro Se		25	4.0%	100%
	Avg. Atty.		**$ 800**[4]			
	Avg. Case		**$ 853**[5]			
	Total			598		

[1] Attorney T discloses an hourly rate in all 7 cases examined. In four cases, he/she appears to have accepted a flat fee averaging $1,675. No fee application had been filed in any case to date.

[2] Not disclosed.

[3] Average of flat fee attorneys only.

[4] Flat fee average only.

[5] Flat fee average only.

Table 3

SUMMARY OF CHAPTER 13 FEE APPLICATIONS IN CASES FILED IN THE FIRST HALF OF 1997

	Division	Tot. Filed	Attorney	Pre-mtg. services	Post-mtg. services	Total Fee
1.	Yakima	9	N	$ 1,230	$ 191	$ 1,421
2.			N	$ 1,515	$ 1,712	$ 3,227
3.			N	$ 1,144	$ 989	$ 2,133
4.			N	$ 1,451	$ 800	$ 2,251
			Average	$ 1,335	$ 923	**$ 2,258**
5.	Spokane	7	R	$ 1,087	$ 2,334	**$ 3,421**
	Spokane	7	T	n/a[6]		
6.	Spokane	4	W	$ 700 flat	$ 2,910	**$ 3,610**
7.	Spokane	4	Y	$ 600 flat	$ 359	$ 959
8.			Y	$ 600 flat	$ 375	$ 975
9.			Y	$ 600 flat	$ 680	$ 1,280
10.			Y	$ 600 flat	$ 0	$ 600
			Average	$ 600 flat	$ 354	**$ 954**
11.	Yakima	3	BB	$ 2,000[7]	$ 2,000	$ 4,000
12.			BB	$ 2,000	$ 1,787	$ 3,787
			Average	$ 2,000	$ 1,894	**$ 3,894**
13.	Yakima	3	JJ	$ 1,200	$ 4,022	**$ 5,222**[8]
14.	Spokane	2	LL	$ 2,068	$ 2,542	$ 4,610
15.			LL	$ 1,900	$ 2,853	$ 4,753
			Average	$ 1,984	$ 2,698	**$ 4,682**
16.	Spokane	2	MM	$ 1,500	$ 4,267	**$ 5,767**
17	Spokane	1	OO	$ 1,336	$ 3,286	**$ 4,622**
18.	Spokane	1	PP	$ 570	$ 300	**$ 870**
19.	Spokane	1	QQ	$ 750 flat	$ 868	**$ 1,618**
20.	Spokane	1	RR	$1,000 flat	$ 830	**$ 1,830**
21.	Spokane	1	SS	$ 1,815	$ 3,116	**$ 4,931**
	Spokane	1	TT	n/a		
22.	Yakima	1[9]	K	$1,000	$ 1,175	**$ 2,175**
	Atty. Avg.	10 atys	Hourly only	$ 1,383	$ 2,402	**$ 3,785**
	Case Avg	15	Hourly only	$ 1,454	$ 2,092	**$ 3,546**
	Aty. Avg.	14 atys	Hourly and Flat plus Hourly	$ 1,206	$2,070	**$ 3,276**
	Case Average	22 cases	Hourly and Flat plus Hourly	$ 1,212	$ 1,700	**$ 2,912**

6 No fee applications filed for the period examined.

7 These $2,000 figures are rounded estimates.

8 This figure is taken from the notice; no fee application is filed. The $1,200 shown as pre-meeting services is the retainer.

9 A fee application was filed in only one case; the remainder of the cases examined were flat fee cases.

Table 4

CHAPTER 13 MONTHLY PLAN PAYMENTS AND SCHEDULED DEBT IN CASES FILED BY SELECTED ATTORNEYS IN THE FIRST HALF OF 1997

Attorney	Ave. Flat Fee	Ave. Plan Payment	Ave. Secured Claims	Ave. Prior. Claims	Ave. Unsec. Claims	Ave. Total Claims
A	$ 979	$ 499	$ 60,000	$ 1,000	$ 22,000	$ 83,000
B	$ 903	$ 122	$ 20,000	$ 1,000	$ 22,000	$ 43,000
C	$ 596	$ 716	$ 39,000	$ 3,000	$ 16,000	$ 58,000
D	$ 900	$ 234	$ 3,000	$ 1,000	$ 13,000	$ 17,000
E	$ 693	$ 367	$ 29,000	$ -0-	$ 10,000	$ 39,000
F	$ 880	$ 410	$ 46,000	$ 4,000	$ 32,000	$ 82,000
G	$ 880	$ 420	$ 28,000	$ -0-	$ 10,000	$ 38,000
H	$ 967	$ 564	$ 32,000	$ 7,000	$ 20,000	$ 59,000
I	$ 583	$ 221	$ 21,000	$ 4,000	$ 20,000	$ 45,000
J	$ 960	$ 185	$ 4,000	$ -0-	$ 9,000	$ 13,000
Var. Flat Fee Attorneys[10]	$ 769	$ 596	$ 52,000	$ 3,000	$ 34,000	$ 89,000
Var. Hourly Attorneys[11]		$ 1,294	$ 83,000	$12,000	$ 35,000	$130,000

Chapter 13 Trustee's Corner

By Daniel H. Brunner, Trustee

As everyone knows, this district has for sometime been laboring under a very large backlog of unconfirmed Chapter 13 cases. In November 1997, we had 1,050 unconfirmed cases. Of that number, 490 remained unconfirmed over 180 days after the date of filing. Of the 490, over 300 were more than 270 days old.

One year later I am very pleased to report that as of the end of October 1998 the number of unconfirmed cases sits at 627. While at first blush that may not sound like a significant reduction from last year's backlog, we need to remember that in the same time frame 1,423 new cases were filed, 1238 cases were confirmed, 388 cases were dismissed pre-confirmation, 155 cases converted pre-confirmation, and 5 cases were transferred out of this district pre-confirmation for a total of 1,800 cases resolved. Moreover, of the 627 cases now remaining unconfirmed, 118 cases are more than 180 days old and of that number only 61 are over 270 days old. Assuming an average filing rate of approximately 100 cases per month and given the time lines set forth in the statutes and the local rules, we estimate that we will have somewhere in the range of between 500 and 600 unconfirmed cases in the pipeline at any given point in time. So as you can see with 627 unconfirmed cases we are just about there.

October 1998 is notable not only as the month in which we were able to claim that we had succeeded in reducing our backlog of unconfirmed bases, but is also the first time in this district that the Chapter 13 Trustee has disbursed more than a million dollars. ($1,021,215.91 to be exact!) These successes are attributable to the perseverance and hard work of a lot of people including the Courts and courtroom deputies, the clerk's office, the U. S. Trustee's office and the debtor's bar. My thanks to all of you who have helped us achieve these results.

As a final point I thought perhaps you all might be interested in the total disbursements to creditors and attorneys made during the fiscal year ending September 30, 1998.

Secured Creditors	$4,816,351.00
Priority Creditors	$1,195,286.00
Unsecured Creditors	$1,667,731.00
Debtor Attorneys	$ 648,531.00
Total	$8,327,899.00

10 Attorneys who filed less than three cases during the period and charged a flat fee.

11 Attorneys charging hourly only.

Case Notes *cont'd*

breach of contract. The mere failure to meet an obligation while acting in a fiduciary capacity does not rise to the level of defalcation. *In re Garver,* 116 F.3d 176, 179 (6th cir. 1997).

The Court also found that the debtor's occupation of the premises did not even deny the partnership other tenants as the evidence showed there was a shortage of tenants for the property. The plaintiffs also alleged that the debtor misappropriated construction loan funds used to make tenant improvements on the suites the debtor leased. The loan funds were intended to be used for tenant improvements. Further, the debtor fully disclosed use of the loan funds for tenant improvements, specifically improvements on suites he leased. Disclosure renders debts dischargeable notwithstanding § 523(a)(4). *Umholtz v. Brady,* 169 B.R. 569, 574 (E.D.N.C. 1993), *affirmed,* 27 F.3d 564 (4th Cir. 1994).

The Court found that the plaintiffs did not submit evidence of defalcation while acting in a fiduciary duty capacity sufficient to sustain a finding of an exception to discharge under § 523(a)(4).

State Statute of Limitation Applicable: Alternatively, the debtor argued that the California statute of limitation had run on the allegation of misappropriation of construction loan funds. If there is a state court judgment or the state statute of limitation has not run, then only the bankruptcy deadline for filing complaints applies in discharge litigation. *Lee-Benner v. Gergely* (*In re Gergely*), 110 F.3d 1448, 1453-4 (9th Cir. 1997); *In re McKendry,* 40 F.3d 331, 337 (10th Cir. 1994). However, the plaintiffs still must be able to prove a debt in order to have that debt declared nondischargeable. Where there is no state court judgment, the bankruptcy court will look to see if the claim is barred by a state statute. Here, there was no judgment and the California statute of limitation barred the action because the debtor had disclosed to plaintiffs the use of the construction loan funds for his leaseholds nearly six years before the commencement of this adversary proceeding.

Donley v. Gordon (*In re Gordon*), Bk. No. 96-13263, Adv. No. 96- 1349, 4/7/98.